# Attorney-General of Hong Kong v Lorrain Esme Osman & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–58 OF 1991
ABU MANSOR ALI J
22 FEBRUARY 1993

***Evidence*** *— Privilege — Legal professional privilege — Communication between solicitor and client — Application to call solicitor to give evidence of such communication in criminal proceedings — Whether communications made in furtherance of illegal purpose — Evidence Act 1950 s 126*

The applicant in their exercise to gather evidence from Malaysia for use in criminal proceedings in Hong Kong, had applied to call a witness Mr Narayanan ('the witness'), an advocate and solicitor. to give evidence pertaining to the several transactions occurring in the law firm of Ng Ek Tiong & Partners at the behest of the firm's client Lorrain Esme Osman ('the respondent'). Counsel for the respondent objected to the witness being called on the grounds that the matters the witness would give in evidence related to the client-solicitor relationship and would breach the confidence that the respondent had reposed in his solicitor and rob the witness of the protection under s 126 of the Evidence Act 1950 ('the Act'). The issue before the court was whether the calling of the witness comes within the provisos to s 126 of the Act.

**Held,** dismissing the objection by the respondent:
According to proviso (a) to s 126 of the Act, the applicant had to satisfy the court that such communication between the witness and the respondent was made in furtherance of any illegal purpose. As the chief magistrate in London had given certain findings on the six charges of corruption and this judgment was confirmed on review by the divisional court, the court had but to respect those decisions that on the evidence before them and before the court there was ample evidence to find prima facie that corruption had been made out against the respondent. The court could not escape the conclusion that the sending of such huge sums of over 5m to Malaysia and then dispersing the sums over a variety of transactions could only be an act or acts of laundering and therefore communications made in furtherance of an illegal purpose under proviso (a) to s 126 of the Act. Therefore, the court ordered that the witness do take the stand to give evidence of whatever transactions that occurred between the respondent and his firm and whatever solicitor and client communication would cease to be confidential.

**[Bahasa Malaysia summary**
Pemohon dalam usaha mereka untuk mendapat keterangan daripada Malaysia untuk digunakan dalam prosiding jenayah di Hong Kong,

telah memohon supaya seorang saksi, Encik Narayanan ('saksi itu'), seorang peguambela dan peguamcara, memberi keterangan mengenai beberapa transaksi yang berlaku di dalam firma undang-undang Ng Ek Tiong & Partners bagi pihak klien firma itu, Lorrain Esme Osman ('penentang itu'). Peguambela untuk penentang itu telah membantah pemanggilan saksi itu atas alasan bahawa saksi itu akan memberi keterangan yang berkaitan dengan hubungan peguam-klien dan akan memungkiri kepercayaan penentang terhadap peguamnya dan menyebabkan kehilangan perlindungan untuk saksi itu di bawah s 126 Akta Keterangan 1950 ('Akta itu'). Isu di hadapan mahkamah adalah sama ada panggilan saksi itu jatuh di bawah s 126 Akta itu.

**Diputuskan**, menolak bantahan penentang itu:
Menurut peruntukan (a) kepada s 126 Akta itu, pemohon mesti memuaskan hati mahkamah bahawa komunikasi sedemikian di antara saksi itu dan penentang itu dibuat untuk pelanjutan tujuan yang tidak sah. Memandangkan bahawa majistret besar di London telah memberi kehakiman berdasarkan enam tuduhan perbuatan memberi rasuah dan kehakiman itu telah diesahkan apabila dikaji semula oleh mahkamah divisyen, mahkamah ini terpaksa menghormati keputusan itu bahawa berdasarkan keterangan di hadapan mereka dan di hadapan mahkamah jelas terdapat keterangan untuk memutuskan secara prima facie bahawa perbuatan memberi rasuah telah diwujudkan terhadap penentang. Mahkamah tidak dapat lari daripada keputusan bahawa dengan menghantar jumlah yang besar sebanyak 5 juta ke Malaysia dan kemudian menyelerakkannya di antara beberapa transaksi hanya boleh merupakan perbuatan melaburkan wang haram dan oleh yang demikian komunikasi telah dibuat untuk melanjutkan perbuatan yang melanggar undang-undang di bawah peruntukan (a) kepada s 126 Akta itu. Oleh itu, mahkamah telah memerintahkan supaya saksi itu memberi keterangan mengenai sebarang transaksi yang telah berlaku di antara penentang itu dan firmanya dan sebarang komunikasi di antara peguam dan klien akan berhenti menjadi sulit.]

[*Editorial Note*: The respondent has appealed the the Supreme Court vide 02–134–93.]

**Notes**
For cases on legal professional privilege, see 7 *Mallal's Digest* (4th Ed) paras 1141–1143.

**Cases referred to**
1 *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701; [1990] 1 WLR 277 (refd)
2 *Derby & Co Ltd & Ors v Weldon & Ors (No 7)* [1990] 3 All ER 161; [1990] 1 WLR 1156 (folld)
3 *Baker v Campbell* [1983] 153 CLR 52 (folld)

**Legislation referred to**
Evidence Act 1950 s 126

*Graham Campbell Grant* and *Miss Ira Biswas* (*Chooi & Co*) for the AG of Hong Kong.
*Anad Krishnan* (*Anad & Associates*) for the first respondent.
*Graeme Hamilton QC* and *Mr Teh Boon Eng* (*Teh & Associates*) for the third respondent.

*Cur Adv Vult*

**Abu Mansor Ali J**: Mr Grant, on behalf of the Hon Attorney-General Hong Kong, in this evidence gathering exercise before me, applies to call a witness Mr Narayanan, an advocate and solicitor, a partner in the firm Ng Ek Tiong & Partners. The matters he would give evidence pertaining to the several transactions occurring in his firm at the behest of the firm's client Mr Lorrain Esme Osman, the second respondent named before me.

Mr Krishnan on behalf of Lorrain Esme Osman objects to this witness being called on the ground that the matters he would give in evidence relate to client-solicitor relationship and will breach the confidence his client has reposed in his solicitor and rob the witness of the protection he has under s 126 of the Evidence Act 1950 ('the Act'):

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure—
>
> (a) any such communication made in furtherance of any illegal purpose;
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

I asked Mr Grant to begin, as clearly the calling of the witness will only be permitted if he could bring the matters within the exception, ie the proviso of the above section.

Mr Grant began by informing the court that the would be witness was already called to give the same evidence before Harun Hashim J (as he then was) in 1986. At that evidence taking conducted for the purpose of another proceeding the respondent through his then counsel raised the same objection that the evidence to be given was covered by legal professional privilege and therefore the evidence could not in any circumstances be given. Harun Hashim J overruled the objection and held that the matters to be given was covered by the proviso to s 126 of the Act. The witness gave evidence.

Mr Grant argued that since this matter had that history as related, the respondent therefore is not entitled to object as the principle of res judicata would apply and the respondent's objection would be tantamount to abusing the process of the court since the question had finally ended with Harun Hashim J's order that he was allowing the evidence to be given.

Mr Krishnan in reply argued that res judicata apply only in civil cases and not in criminal cases. He cited several authorities on the point and I am of the view that there is merit in his argument that res judicata comes into play only in civil cases and not in criminal cases. The only instance, if at all it applies, is when the principle of autre fois acquit and autre fois convict applies.

I considered that the matter of the calling of this witness comes squarely, whether Mr Grant can come within the provisos to s 126 of the Act. It is clear to me that it is common ground to both parties that the calling of Mr Narayanan is, by the authorities cited by both sides, clearly prohibited by s 126 of the Act unless Mr Grant can bring himself within the proviso of the Act.

Mr Grant's position was that the AG of Hong Kong comes within the proviso and therefore is entitled to call this witness. Mr Grant says this witness is a necessary witness as he fills in the required details how the corrupt money, to be adduced by the AG of Hong Kong, appeared and on whose instructions its disbursements was ordered or was undertaken.

It is the intention of the AG to prove in Hong Kong that the defendant Lorrain is guilty of having agreed to accept corrupt money from the Carrian Group represented by George Tan, the third respondent. Then some portion of such money about 5m was transmitted by Lorrain to his solicitors Ng Ek Tiong & Partners.

Mr Grant submitted that he has to satisfy the court according to arm (a) of the proviso to s 126 of the Act that such communication was made in furtherance of any illegal purpose. He cited and the Crown relies on the evidence already found by the chief magistrate in London in the case of Lorrain in *R v Governor of Pentonville Prison, ex p Osman.*[1] The detailed judgment of the chief magistrate went up for a review by the divisional court and his Lordships of the divisional court confirmed the learned chief magistrate's finding of fact and law. This includes the finding of the chief magistrate on the six charges of corruption we are concerned.

I find merit in the argument of Mr Grant that this court has but to respect the decision of the chief magistrate, the divisional court in England that on the evidence before them and before me there is ample evidence for me to find prima facie that corruption has been made out.

As has been submitted by Mr Grant, this court has the benefit of Harun Hashim J's decision in 1986 on the same pieces of transaction that the communication was for a illegal purpose, the purpose of which was to put the sums obtained in various transactions to be out of reach of the real owner of it.

In support of this application Mr Grant cited *Derby & Co Ltd & Ors v Weldon & Ors (No 7)*[2] where the plaintiff therein embarked on an action against the defendant's alleging deceit, conspiracy to defraud and seeking delivery of secret profits. A question of legal professional privilege was

raised and the court held: 'Where communications which would otherwise be within the protection of legal professional privilege had been made in furtherance of a fraudulent design, a person was not entitled to assert legal professional privilege as a ground for refusing to disclose those communications in circumstances where the party seeking disclosure was able to establish a strong prima facie case of fraud.'

Mr Krishnan on the other hand contended that the AG of Hong Kong cannot bring himself within the proviso of s 126. He argued that it is incumbent on the AG of Hong Kong in order to come within either provisos (a) or (b) of s 126 of the Act to show that the engagement of the solicitor occurred before the offence was committed. He argued further that according to the evidence and facts of the case as given by the prosecution in the London proceedings the offence was committed first in Hong Kong and then Lorrain engaged or transacted with the solicitors in Malaysia after the offence. He argued that if the offence is already completed in Hong Kong, Lorrain's communication with his solicitors in Malaysia could not be in furtherance of any illegal purpose. In particular each charge brought against Lorrain had to be separately proved as having been committed in Hong Kong and therefore payment or remittance of such money to Malaysia cannot be said to be in furtherance of any illegal purpose. He further argued if the money found their way into a solicitor's account and then dispersed; all that part involving the solicitors and those transactions must be privileged communications. In support he cited the Oxford dictionary meaning of 'furtherance' — there must be some evidence that the solicitors were furthering an illegal purpose.

In this evidence recording it is clear under O 39 of the Rules of the High Court 1980 that the examiner does not concern himself with the admissibility of the evidence. That is for the trial judge. It has been submitted and it appears, however, the issue of legal professional privilege concerns the production of evidence rather than that of admissibility. I am asked by parties to make a ruling here for the production of the sought for evidence if circumstances warrants its production.

On the authorities cited before me I am clear, I have to decide according to the facts of each case. After having considered this issue and after considering the authorities and the facts before me, in particular the submission of counsel for the AG of Hong Kong, that the commission of the alleged corruption was over a period of years which started in 1981 going through to 1983, in the event there is none of the so-called completed offence or completed transactions.

I therefore found no merit in the argument of Mr Krishnan that the offence of corruption was completed in Hong Kong and the transfer of the funds to solicitors in Malaysia was after that. I find putting of event into such compartments is like putting blinkers over our eyes. Subject to what the trial court is going to say, with the benefit of the transcript of the evidence before Harun Hashim J, I cannot escape the conclusion that the sending of such huge sums of over 5m to Malaysia and then dispersing the sums on a variety of transactions can only be an act or acts of laundering as described by Mr Grant and therefore communications made in furtherance of an illegal purpose, under proviso (a) of s 126 of the Act .

I am persuaded by the above cited case of *Derby & Co Ltd & Ors v Weldon & Ors (No 7)*[3] which also held, inter alia, that although the order of disclosure must be sparingly given, nevertheless, since the creation of the trusts and the transfer of the assets to them, steps were taken in furtherance of the initial fraud alleged, in the sense that they were taken to conceal or render irrecoverable profits made by LMFE, the plaintiffs had asserted a proprietary claim and were able to establish a strong prima facie case of fraud and as a result were entitled to the disclosure sought.

In this decision I am also persuaded by the judgment in *Baker v Campbell*[5] where Deane J held:

> The privilege does not extend to protect communications which are in themselves part of a criminal or fraudulent proceeding or course of conduct or which constitute the whole or part of an actual dealing or transaction (see *O'Reilly*'s case). Nor does it extend to protect things lodged with a legal adviser for the purpose of obtaining immunity from production.

Fortified by the authorities cited above and in the public interest I duly order that Mr Narayanan do take the stand to give evidence of whatever transactions that occurred between Lorrain and his firm and whatever solicitor and client communication will cease to be confidential. In so ordering I make no imputation that the firm of Ng Ek Tiong & Co was in anyway implicated; in carrying out the client's instruction the firm may well be blameless.

*Order accordingly.*

Reported by Yap Foo Ken